

(1962) 12 OHC CK 0015
In the Orissa High Court
Case No : Second Appeal No. 363 of 1960

Prahallad Thappa

APPELLANT

Vs

Md. Yusuf Khan

RESPONDENT

Date of Decision : 11-12-1962

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145
Orissa Tenants Relief Act, 1955 — Section 2(1), 3, 3(1)
Registration Act, 1908 — Section 49

Citation : (1963) 29 CLT 85

Hon'ble Judges : Misra, J

Bench : Single Bench

Advocate : A. Das and L. Rath, for the Appellant; R.N. Misra, for the Respondent

Final Decision : Allowed

Judgement

Misra, J.—The Defendant is the Appellant who has lost in both the courts below. The Plaintiff's case is that the disputed land was mortgaged with the Defendant under an unregistered document Ext. A dated 26-8-1952 executed by the Plaintiff in favour of the Defendant. The Plaintiff took a loan of Rs. 100/- and for repayment of the loan he gave the land for two years to be cultivated by the Defendant and out of the usufruct for two years to get the loan discharged. There was a proceeding u/s 145 Code of Criminal Procedure between the parties in which the Defendant succeeded on 21-8-1957. The Defendant took the plea that he was a non-evictable tenant under the Orissa Tenants' Relief Act. The suit is therefore for declaration of title and recovery of possession.

2. The Defendant's case is that Ext. A is not a mortgage but a lease and he is not evictable u/s 3 of the Orissa, Tenants Relief Act.

3. The learned Munsif found that Ext. A is a mortgage and not a lease, and as the mortgage has been discharged after the expiry of the two years he decreed the Plaintiff's suit for declaration of title and recovery of possession. The learned Subordinate Judge disagreed with the learned Munsif in holding that Ext. A is a

lease and not a mortgage. He however dismissed the Plaintiff's suit holding that Ext. A being unregistered is not admissible in proof of a lease and moreover u/s 9 (N.B.) of the Sonapur Bhumi-bidhi the Defendant's possession is illegal, and that the Defendant not having acquired any tenancy right the Plaintiff's suit for eviction is maintainable.

4. It is not disputed before me and rightly that Ext. A is a lease and not a mortgage. It is the admitted case of both parties that Rs. 100/- taken under Ext. A was paid up from the usufruct of the disputed land for the two years under lease (1953-54 and 1954-55). Though Ext. A is not admissible in evidence being unregistered it is certainly admissible for collateral purpose u/s 49 of the Registration Act. But that apart by the acceptance of rent by the Plaintiff for the two years towards discharge of the advance the tenancy is established. The learned Subordinate Judge fell into confusion in holding that there can be no tenancy proved aliunde when an unregistered document is inadmissible due to want of registration.

5. u/s 2(l)(j) of the Orissa Tenants Relief Act, "tenant" has been defined as follows:

"tenant" means a person who under the system generally known as Bhag, Sanja or Kata or such similar expression, or under any other system, law, contract, custom or usage cultivates the land of another person on payment of rent in cash or in kind or in both or on condition of delivering to that person (i) either a share of the produce of such land, or (ii) the estimated value of a portion of the crop raised on the land, or (iii) a fixed quantity of produce irrespective of the yield from the land, or (iv) produce or its estimated value partly in any one of the ways described above and partly in another;

x x x.

Section, (1)(a) of the Orissa Tenants' Relief Act is as follows:

(1) Notwithstanding anything in any law, contract or usage or in any decree or order of any Court but subject to the provisions of this Act.

(a) no tenant in lawful cultivation of any land on the 1st day of July, 1954 or at any time thereafter shall be liable to be evicted from such land by the landlord.

The meaning of the word "lawful" has been relied upon with reference to Section 9 of the Sonapur Bhumi-bidhi to say that the cultivating possession of the Defendant was not lawful u/s 9, and as such even though the Defendant might be in possession of the disputed land on 1-7-1954 his possession is not lawful and as such he is evictable. It is necessary to quote the relevant portions of Section 9 of the Sonapur Bhumi-bidhi.

"Section 9 To grant temporary lease of the bhogra lands either by the lambardar gauntia or by a co-sharer gauntia is no doubt not an act of such a transfer of lands as has been provided in law as illegal, but granting of such lease shall be

subject to the following provisions, namely:

(i) the gauntia having protected status may of his own accord lease out the whole bhogra land in his possession temporarily for one year only without, however, being entitled to give the lessee any right pertaining to the lambardari rights of the village.

x x x x

N.B. The cultivating possession of an outsider of the bhogra lands for a period exceeding the time provided in Section 9, Clauses (i),(ii) and (iii) shall be presumed as illegal possession under the rightful holder of the bhogra lands.

On a fair perusal of the general portion of the section preceding the different provisions following it, it becomes quite clear that temporary lease of bhogra lands by a lambardar gauntia or by a co-sharer gauntia without protected status has not been provided in the Sonapur Bhumi-bidhi as illegal. Proviso (i) however legalises a transfer by a gauntia with protected status for one year only and by virtue of the provision in N.B. the possession of any outsider exceeding one year is illegal in law. Read with Section 20 of the Bhumi- bidhi this construction appears to be the only reasonable construction.

6. In this view of the matter it was necessary for the courts below to determine in this suit whether the Plaintiff was a gauntia with protected status. The onus is certainly on the Plaintiff for the simple reason that he wants to get out of the mischief of Section 3(1)(a) of the Orissa Tenants Relief Act by asserting that the possession of the Defendant was not lawful. The Plaintiff therefore should have put in a further pleading after the written statement alleging that he was a gauntia with protected status and on the face of it the lease being for more than one year the subsequent possession of the Defendant after expiry of one year was megal and as such unlawful. Unfortunately this aspect of the case did not strike any of the advocates conducting the case in the lower courts nor to the courts below, resulting in non-determination of the material point arising in the case.

7. In the result the case must go back on remand to the trial court. That there is relationship of landlord and tenant between the parties is to be taken as finally determined by this judgment and is not to be registered again. The only question on which the parties are to be allowed to adduce evidence is whether the Plaintiff is a gauntia with protected status. If the Plaintiff fails to prove that he had protected status, the Plaintiff's suit must fail as the possession of the Defendant cannot be said to be unlawful under the provisions of any statute. If the Plaintiff had protected status then the Defendant's possession after the expiry of one year from the date of the lease is clearly unlawful and the suit for eviction must succeed. The Plaintiff should be asked to file a further pleading or to amend the plaint to include this averment. This is undoubtedly an extraordinary liberty allowed to the Plaintiff. But the case comes from an undeveloped area and in the circumstances it would be doing injustice to interpret the law at the second

appellate stage to work out ultimate in-justice.

8. In the result, the appeal is allowed and the suit is remanded to the trial court to dispose of the case in accordance with law and the aforesaid directions. Parties to bear their respective costs till now costs after remand would abide the result.